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Supreme Court of the United States

OCTOBER TERM, 1935

No. 686

FRED O. MORGAN, doing business as FRED O. MORGAN SHEEP COMMISSION COMPANY, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA and THE SECRETARY OF AGRICULTURE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

REPLY BRIEF FOR APPELLANTS

FREDERICK H. WOOD,
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REPLY BRIEF FOR APPELLANTS.

Appellees' brief contains many statements unsupported by the record and makes many inferences entirely unjustified thereby. It distorts the opinion of the court below and ignores admissions contained in appellees' answer. Many of the statements made in the brief are so patently unsound when examined in the light of the record that it would seem that appellees' purpose was to create doubt and uncertainty, rather than to convince or enlighten the Court, in the hope that as a result of such confusion of statement the questioned order might be permitted to stand. In the light of this situation, and in order to relieve, if possible, the Court from a part of the burden thereby cast upon it, appellants make this reply.*

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*References to paging of appellees' brief, as hereinafter appearing, relate to the page proofs of brief submitted to appellants. At this writing we are not in receipt of appellees' completed brief.

COMMENT ON APPELLEES' STATEMENT.

The statement of appellees' carries a reference (Br. 5) to the schedules of rates and charges of appellants which the order of the Secretary seeks to supersede and states that "on May 11, 1932 * * * appellants filed a new schedule of rates designated as Schedule 3." In view of statements subsequently made in the brief concerning this schedule of rates it should be pointed out that appellants on that date filed individual schedules, not a joint tariff such as was under inquiry in the so-called *Omaha* case. These individual schedules were prepared and filed by the appellants during the pendency of this proceeding and under advice of their attorney. The Secretary's order states that these schedules were filed to reduce the rates by reason of the adverse economic situation which developed in the livestock industry in 1932 in so far as the patrons of appellants were concerned and also to put in effect a less discriminatory schedule in respect of selling charges (FF. 175, R. 126, FF. 112, R. 82). It is admitted in the answer of appellees that the reduction accomplished by the new schedules amounted to more than 10% (R. 140).

It also appears from the record that the original rates and charges were fixed on a uniform basis as to all selling market agencies by an order of the Secretary entered in 1924 in a proceeding under the Packers and Stockyards Act brought on complaint of the American National Livestock Association (Res. Ex. 24). The record discloses that, when hearings were to commence before an examiner appointed by the Secretary, the appellants then engaged in business suggested that they would permit the men placed in charge of the proceeding to make such investigation as they might

desire as to the reasonableness and non-discriminatory character of rates and charges in effect and, if the Secretary after such investigation approved the rates and charges recommended, would abide by them without seeking Court review. The test year taken as a basis for such uniform rates by Howard N. Gore, afterwards Assistant Secretary of Agriculture, and Golden N. Dagger, in charge of Rates and Practices for the Packers and Stockyards Administration, Department of Agriculture, was the year 1923, shown by the evidence in the record to have been in point of volume of receipts the best year appellants experienced within the last decade (Res. Ex. 36). It was a year of large volume and comparatively low livestock prices (Res. Ex. 40).

The rates so established and put in force by an order of the then Secretary of Agriculture were approximately 15% less than the rates theretofore in effect. They remained in effect through a period, not as suggested in appellants' brief "of great prosperity" to appellants, but through a period of depressed volume of receipts which reduced appellants' gross income, although there were high returns to the users of appellants' services because of increased livestock prices. As admitted by the answer it was the rates so determined by the order of the then Secretary of Agriculture in that proceeding which during the course of this proceeding were reduced by 10% under the tariff filed May 11, 1932, and applied under a tariff structure less discriminatory in character.

The statement of appellees refers to the opinion of the District Court and says that "the Court found that the findings of fact made by the Secretary were supported by substantial evidence" (Br. 7), but fails to state that in the final opinion of the majority of the Court filed, June 20, 1935

(R. 164-166), the original opinion upon this question was superseded and the District Court held that salesmanship costs and allowances for "business getting and maintenance" expenses made by the Secretary were against the weight of the evidence but was "not prepared to say that the findings were made without *any* evidence to support them" (emphasis ours) (R. 166). The Court further said in the final opinion that

> "in the *Tagg* case the Court upheld an order of the Secretary in which he used *typical experience* as his guide for determining reasonable costs for rate-making purposes. Typical costs are presumably based on the actual experience of the members of the industry whose rates are under consideration. In this case the Secretary employed hypothetical costs based not upon present, but upon assumed conditions which he expects may exist at some future time. * * *
>
> "Further consideration upon this petition for rehearing convinces that in the instant proceeding the Secretary has departed from the method employed in the *Tagg* case in the particulars pointed out by petitioner as stated above. Furthermore, I think the drastic reduction of advertising and other costs, essential to getting and maintaining business, gives scant consideration to the reasonable necessities of the situation as disclosed by experience" (R. 165, 166).

Departures from the method employed in the *Tagg* case pointed out in this opinion were (1) that the Secretary had employed an unreasonable and arbitrary method of determining so-called reasonable functional unit costs whereby essential competitive costs were drastically reduced in disregard of actual experience and contrary to the provisions of the Packers and Stockyards Act which required the

stockyards to be maintained as a *"public"* and competitive market; (2) the failure to consider the effect of the rates upon individual market agencies and to include the costs essential to the maintenance of a competitive market; (3) that the method employed would result in the establishment of a monopoly of the market and if carried to logical conclusion would stifle competition and tend to weaken and ultimately to destroy the market; (4) that under the order the market agencies involved could not operate at a profit if actual costs resulting from their business operations during the test period were considered (R. 164).

COMMENT ON APPELLEES' SUMMARY OF ARGUMENT

Appellees at this point in the brief indulge in an argumentative assumption, not based on the record or upon any findings of fact made by the Secretary, and injected into the brief for the obvious purpose of prejudicing and confusing the Court in the further consideration of the case. Appellees state (Br. 9) "If as a result of unreasonably high existing rates there are more agencies doing business on the market than the volume of business coming to the market warrants, the fact that as an incidental result of prescribing reasonable rates some agencies may be unable to continue in business does not invalidate the rates prescribed". From this statement the conclusion is drawn that "reasonableness of the rates prescribed by the Secretary is not to be tested by applying those rates to the actual costs incurred by appellants". There was no evidence in the record or before the Secretary that more agencies were engaged in business than the volume of business warranted

"as a result of unreasonably high rates". On the contrary, the evidence disclosed and the answer admits that the rates were relatively low (R. 140).

In the succeeding paragraph of appellees' brief (par. 2, p. 9) appellees through misstating and misquoting appellants' contentions, as presented at the very outset of the proceeding, pursue that method of argument which involves setting up a straw man in order to knock him down again, and thus evade the real issues. Here appellees say that appellants' contention is "that the prescribed rates are confiscatory because they will not cover the costs incurred by, and in addition provide a profit for each market agency now operating in the Kansas City market" (Br. 9). We challenge appellees to point out where at any stage of the proceeding or in the brief filed in this Court on behalf of appellants this contention was urged. On the contrary there appears in appellants' brief the following typical statement (Appellants' Brief, p. 98): "We do not assert that rates must be made so as either to meet the actual costs of each and every agency or the average costs of all. We do assert that they may not be made, and certainly not under the facts of this case, so as to fail to pay the actual expenses of the most efficient, or leave but a bare margin thereover, and again, we repeat, the Secretary did not find that any of these firms were inefficiently operated, unless their failure to attain his hypothetical standards and to conduct their business upon the basis of his hypothetical costs constitutes inefficiency."

ARGUMENT

I.

THERE IS NO MERIT IN THE CONTENTION OF THE APPELLEES THAT COVERING ACTUAL COSTS AS INCURRED BY THE APPELLANTS, OR ANY OF THEM, INTO RATES WILL "DEFEAT AND NULLIFY THE RATE MAKING POWER CONFERRED UPON THE SECRETARY BY THE PACKERS AND STOCKYARDS ACT".

1. The existing rates in this case were not fixed by agreement or monopolistically.

In the development of this argument appellees devote several pages of their Brief to an attempt to show that the rates under inquiry were "monopolistically fixed" as found by the Secretary in the case of *Tagg Bros. & Moorhead v. United States,* 280 U. S. 420. The order of the Secretary in this case, however, contains no finding parallel in any way to that contained in the *Tagg Bros.* case indicating that the rates had been fixed by agreement or were monopolistic. Nevertheless, despite the absence of such finding, for the first time in this entire proceeding and without support from the record, it is charged that the rates were so fixed and that appellants "have eliminated rate competition."

Furthermore, it was shown in evidence that rate competition does exist, not only in buying rates but in selling rates as well. The tariffs filed by the cooperatives doing a large volume of business in direct competition with appellants were upon a different basis and prescribed lower rates and, in addition thereto, provided for refunds of any profit or

saving made under the rates collected in the event operations produced such profits (R. 64, Gov. Ex. 103, 103a, 104). This rate competition with cooperatives, particularly with the Producers Commission Association, was further intensified by the fact that this association was assisted financially, indirectly at least, by the Federal Government (Res. Ex. 4, Release of Federal Farm Board, October 25, 1929, March 5, 1929, R. 356, 514, 515, 516).

Next there appears a description (Br. pp. 17, 18) of the proceedings whereby the rates of appellants first placed under inquiry in this proceeding originated. The attempt is made to make it appear to the Court that the situation in the *Tagg Bros. & Moorhead* case, so far as the origin of the rates is concerned, was similar to that relating to the rates in this case. The statement is made that the market agencies at Omaha had filed a new tariff containing higher rates and charges. The truth as disclosed by the *Omaha* record was that the Exchange at Omaha filed a new tariff containing higher rates and charges. No reference is made to the origin of the new tariffs at Kansas City, which were filed, not by the Exchange but by the individual market agencies, and which did not increase but lowered rates and removed discriminations arising under the old rates in a manner approved by the order of the Secretary in this case. Thus, the appellees, by the statement in each instance of a half-truth, seek to create the false impression of verisimilitude between the two cases in this respect. If such contentions were to be urged in this case the Secretary should have presented them in the order and they should also have found their place in the findings of the lower court (*Railway Commission Company* v. *Maxey*, 281 U. S. 82, 74 L. Ed. 17; *Hammond* v. *Schappi*, 275 U. S. 165, 172, 171, 72 L.

Ed. 219, 221; *Virginia Railway Company* v. *United States*, 272 U. S. 658, 71 L. Ed. 46).

2. It is untrue that with the decline in business there has been no corresponding falling off in personnel, expenses and number of market agencies.

Appellees conclude this portion of the argument with a statement that although the business of the market as a whole has fallen off the number of firms has shown no tendency to decrease. This statement is not correct and directly contradicts all of the evidence in the record; no record references are given in appellees' brief to support it. Inaccurate and unsupported statements of this character are necessarily misleading. Tremendous reductions have occurred not only in overhead, as alleged in plaintiff's petition and not specifically denied in defendant's answer, but also in the number of agencies in operation at the Kansas City Stockyards and in the personnel of the owners of those agencies. As heretofore pointed out, the number of market agencies selling livestock in the Kansas City market has shown a steady decline, being 65 when the rates originally fixed by the Secretary under the Act went into effect in 1924, and diminishing from 1929 on to the present time until, as stated in appellees' own brief, only 43 including the cooperatives now remain. The number of members of the Livestock Exchange has been reduced during this period from over 300 to less than 225, as of 1931 (R. 271). Later on in appellees' brief in arguing another point, and in an attempt to explain away the fact that since these suits were filed 9 agencies have gone out of business, the statement is made "that 18 firms retired from

business between the first and second hearings before the Secretary—a period of less than two years and before impounding commenced" (Br. 53). It is noteworthy that in support of the last statement appellees give record references and that the statement directly contradicts the statement made on page 20 that "the number of firms has shown no tendency to decrease", made without record reference. We submit that such inconsistent and such manifest misstatement does not serve to enlighten the Court upon the true state of the record.

Furthermore, the record discloses that the amount claimed by appellant agencies in respect of compensation for owners' services, as shown by their own cost accountants' figures, was less in the year 1931 than in the year 1929 by $403,208.38, or approximately 22% of the total compensation for the former year (Resp. Ex. 53, 207). The total selling and buying salary cost for all respondents recognized by the chief accountant for the Government was less in 1931 by $231,703.51 than in the year 1929, or a reduction of approximately 30%.[1] And yet in this paragraph of the brief we find the following statement made without record reference:

> "The record in this case discloses that the most important items of cost have mounted with reduction of volume of receipts coming to the market" (Br. p. 30).

Certainly, statements of the character above referred to, and we have referred in substance to all of the statements

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[1]Gov. Ex. 15, p. 10, col. 2; Gov. Ex. 115, pp. 7^1 and 7^2, col. 3. The Government's accountants included as costs in their cost studies for 1931 (Gov. Ex. 115) owner compensation not included in the studies for 1929 (Gov. Ex. 15).

made in this section of the brief, do not furnish adequate support for the conclusion that recognition of actual costs in respect to the business of any agency or group of agencies would serve "to defeat or nullify the rate making power of the Secretary".

3. The appellants do not contend that the Secretary must fix rates which will preserve all of the existing market agencies.

The next proposition urged by the appellees is that there is no basis for appellants' contention that the Secretary must fix rates which will preserve all the existing market agencies. We have heretofore pointed out that no such contention has been advanced by appellants. The practice of setting up a straw man to knock him down again and thus to misrepresent appellants' contentions does not serve to advance a proper understanding of the issues.

Appellees correctly say that the whole order of the Secretary is challenged by appellants because "grounded upon the Secretary's opinion that there are too many market agencies and too much competition in the business and that he has set about to prescribe rates which will accomplish his allegedly illegal purpose to reduce the number of market agencies competing for the business at the Kansas City Stockyards". The statement is then made that appellants do not attempt to press this to the *"inevitable"* conclusion, to wit, that the Secretary has no authority to make a rate order that "does not preserve all existing marketing agencies". It is said that this conclusion exposes the fallacy of the premise (Br. 22). The answer is that the

conclusion which appellees refer to is neither logical nor inevitable and is in direct conflict with the actual conclusion resulting from the situation as stated and set forth in appellants' brief (Appellants' Br., p. 168). Let us assume that among these competitors, as in the *Tagg* case, the Secretary employs as a guide the actually experienced costs of a group of representative or typical agencies who are efficiently conducting their business under the conditions existing at the time the inquiry and investigation is made. In other words, let us presume that he makes the character of investigation customarily made by the Interstate Commerce Commission as illustrated in the various opinions of that Commission referred to in appellants' brief. The result will manifestly be a rate covering the actual and necessary costs of these typical and representative agencies incurred under actual operating conditions, as stated in appellants' brief. It will not be, as appellees demand, a rate that would fail to cover the cost of any of these typical and representative agencies and which would relate itself wholly to problematical conditions which may exist at some future time when a large number of these or other agencies have been driven out of business by unremunerative rates. Assuming that the rates are determined upon the basis of the typical or normal costs of representative agencies, manifestly there will be many agencies as to whom such rates will be non-reimbursible of actual costs. Appellants do not complain of this.

None of the appellants, on the sole ground of confiscation, would have the right to complain of the rate because it was confiscatory as to another appellant or group of appellants. *Aetna Insurance Company* v. *Hyde*, 275 U. S.

440. And this situation, as far as the issue of confiscation is concerned, leaves the Secretary free to apply one rate to one petitioner and one rate to another petitioner. This, as appellees in effect admit, would "compel retirement from the competitive field" of agencies that could not meet the competition of the agencies for which lower rates had been prescribed, either by a greater selling efficiency or by lowering costs. Therefore, appellants' argument in this respect is not "simply an attempt to nullify the rate making power over market agencies" but to support and sustain it and align it with the facts applicable to each individual appellant. At the very outset of the proceeding and at the time the first hearing was commenced before an examiner appointed by the Secretary, it is shown by the record that each appellant severally demanded an individual hearing and determination of the issue as to him (R. 199). This demand has been constantly reiterated and the individuality of the proceedings as to each appellant maintained in so far as it was in the power of the appellants to maintain it.

4. There is no merit in appellees' contention that the Secretary's rates cannot be tested by actual costs.

At this point appellees again beg the question by an assumption that the costs incurred by appellants are "unreasonable costs" and without reference to the record or any finding of evidentiary fact contained in the Secretary's order reach the conclusion that actual costs furnish

> "no criterion of the reasonableness of the prescribed rates" (Br. 26).

The statement is then made that there are certain costs which the conditions of the business tend to hold down and that

> "certain other costs (salesmanship and business getting and maintaining), the conditions of business as carried on at the Kansas City Stockyards tend to increase".

Again no reference to the voluminous record is made and the conclusion reached is as barren of factual support as is a similar statement appearing in the order of the Secretary (FF. 131, R. 91). As to just why costs relating to salesmanship and business-getting and maintaining, including the expense of maintaining the livestock exchange, traveling expense, market reports to shippers, automobile expense and other like expenditures are incurred under conditions which do not tend to limit their amount, while other categories of expense such as yarding, office work, administration expense, etc., are of a type which conditions tend to hold down, is unexplained either by the order or by appellees' brief. It will be noted that this conclusion of ultimate fact is the one upon which the departure from the use of actual costs as a criterion and guide for the determination of reasonable costs in connection with the great bulk of expense incurred in the operation of appellants' businesses is based. It does not follow that the "conditions" which tend to increase certain categories of costs are conditions which make such costs in the amounts incurred *unnecessary* costs. Even the conclusion itself does not adopt the premise that appellants individually or collectively have any power to control the conditions, whatever they may be, that tend to increase instead of diminish these costs. It is thus apparent that the use

of the phrase "unreasonable costs" as employed by appellees cannot, even upon their own theory, be construed to mean "unnecessary costs" or costs which the appellants and each of them were not inevitably and necessarily required by the "conditions of the business at the Kansas City stockyards" to incur. In other words, under appellees' theory as stated in the opinion of the majority of the court below by Van Valkenburgh, *J.*, these costs which were disallowed and manifestly are not covered by the prescribed rates were "essential to getting and maintaining business" (R. 165, 166).

Appellees, having failed to establish the propriety of disallowing any part of the costs actually incurred, abandon the sequence of the argument and inject the statement "that the maximum rates prescribed" if applied in 1931 would have yielded "approximately $112,000 in excess of the costs found by the Secretary to be reasonable for all species of livestock for the market as a whole" (Br. 28). A similar statement is again injected into appellees' brief under Point V (Br. pp. 66, 67). The statement, as hereinafter pointed out, is misleading and disregards entirely the effect of the opinion of the court below. It constitutes a studied and deliberate attempt to lead the court into the erroneous belief that the Secretary either by intentional act or by inadvertence, was more than fair to appellants in the determination of the altitude of the prescribed rates (see *infra*, pp. 26, 27, 28).

II.

APPELLEES' CONTENTION THAT THE CASES DO NOT PRESENT ANY ISSUE OF CONFISCATION IS WITHOUT MERIT.

The concession is made by appellees, in contradistinction to the position taken by the rate-making authority in *Aetna Insurance Company* v. *Hyde*, 275 U. S. 440; in *Tagg Bros. & Moorhead* v. *United States, supra;* and in the recently submitted case of *Acker et al.* v. *United States,* that the several individual petitions filed on behalf of each of the appellants, from a procedural standpoint, contain allegations sufficient in content and context to raise the issue of confiscation. It is, however, contended by appellees that the validity of the order in question involves only the question of a fair or reasonable return upon personal services rendered by appellants in the public interest, and not primarily the question of "a fair return upon the fair value of property employed in the public service" (Br. 35). It is asserted that under the Fifth Amendment to the Constitution of the United States, the right of the individual employing his property in the public service to a fair return upon the value of that property receives protection against invasion, whereas the right of the individual to a fair return for his personal services, likewise rendered in the interest of the public, is not thus safeguarded. This contention is made despite the express language of the Fifth Amendment, extending, as it does, the scope of its application to "life, liberty and property". The argument is that inasmuch as no "specific criteria" governing the amount of the fair return to which the individual may be entitled for his

personal services exist, the constitutional safeguard is, therefore, incapable of enforcement. The question is fully discussed in the main brief of appellants. It is not, in our judgment, debatable. It may be observed, however, that it is not customary in legislative acts to set forth the amount of the fair return to which property employed in public service, and as to which it may receive the protection of this Amendment, is entitled. Courts have properly reserved to themselves the right, upon the evidence, to pass upon the question as to the rate of return allowed. This has been true for the self-evident reason that the determination of this rate, whether it be 4%, 5% or 8%, involves the question whether or not property has received that protection to which it is entitled under due process.

In this proceeding the Secretary has determined that a fair annual compensation to an owner cattle salesman, under conditions obtaining at the Kansas City stockyards during the test year, was $4,000, and the Secretary has also determined that 6% was a fair return on the working capital that was employed in the public service. If the amounts which the Secretary considers to be fair returns for personal services are applied in the instance of each of appellants' agencies as a measure of the fair return to owners for their services, the order is confiscatory as to every appellant, not upon the basis of "calculable costs", as indicated by appellees' brief, but, as alleged, upon the basis of the Government's own costs (Pet. Ex. 4, sheets 1 and 2, Appellants' Br. p. 36). The appellees should not, as they apparently do in their brief (Br. p. 37), confuse their own inability or unwillingness to suggest a method for the determination of the amount of fair return to which owners are

entitled, with the inability either of appellants, or of this Court, to do so. The applicable law, stated by Mr. Justice McReynolds in *Calhoun* v. *Massie*, 253 U. S. 170, 182, in his dissenting opinion in that case, has never heretofore been the subject of challenge from any responsible source.

> "The Fifth Amendment was intended to protect the individual against arbitrary exercise of federal power. It declares no person shall be deprived of life, liberty or property without due process of law, and this inhibition protects every man in his right to engage in honest and useful work for compensation. *Adair* v. *United States*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1; *Adams* v. *Tanner*, 244 U. S. 590."

In this portion of the brief appellees repeat the statement that appellants "have protected themselves against one of the most usual causes of the destruction of a business—*i.e.*, price competition". Again no record reference appears, and again the statement is unsupported by any finding of the Secretary or by any facts contained in the record. Exactly the contrary appears, for, as heretofore pointed out, the most dangerous form of price competition exists, namely, that of cooperative agencies which do not stand on their own feet. They are encouraged by the Secretary to engage in making the very expenditures of money and effort and time which the appellees in this very brief would have the Court believe are "unreasonable, extravagant and excessive" (Res. Ex. 18, R. 231, 350, 351).

III.

APPELLANTS' CONTENTION THAT THE PRESCRIBED RATES "ARE RUINOUS" IS MERITORIOUS.

Appellees attempt to urge the following propositions upon the court in this section of their brief (Br., pp. 48 to 55).

> (1) The opinion of Judge Van Valkenburgh on rehearing, concurred in by Reeves, *J.* (R. 164-166), holding that the Secretary failed to cover into the rates prescribed essential competitive costs and ignored and failed to adopt the method of rate making approved in the *Tagg* case, did not modify the original opinion of the court because "the petition for rehearing (R. 159-161) was based solely on alleged errors of law and did not request a review of the evidence."
>
> (2) That the vastly larger returns under the rates prescribed in the *Tagg Brothers* case at Omaha, as shown by the excerpt from the Record of that case produced in appellants' brief, is not persuasive inasmuch as comparison of conditions at the two stockyards "shows a notable difference in favor of the Omaha stockyards as to the volume of animals handled" (Br. 55).

As to the first proposition, that the petition for rehearing did not authorize the court below to review the evidence and alter its findings of fact, reference to Section III of the petition for rehearing (R. 160) discloses that this petition charged that the findings of fact con-

tained in the original petition did not meet the requirements of Equity Rule 70½, disregarded many of the admissions of appellees contained in the joint answer filed, and by purporting to adopt the Secretary's findings of fact left it uncertain and subject to misunderstanding as to just what the court's findings of fact were, and failed to disclose which of the issues presented and not considered by the court were deemed material and relevant and which were immaterial and irrelevant (R. 161). Consideration of this motion demanded of the court that the findings of fact be reconsidered. The result was another opinion by the majority of the court sustaining the position of appellants from a factual standpoint but holding, as Judge Van Valkenburgh had held in his original concurring opinion, that under the law the Secretary "was possessed of almost dictatorial power." Appellees misquote the opinions of Judge Van Valkenburgh when the statement is made that he found the order to have been supported by "substantial evidence". His opinion, concurred in by Judge Reeves, shows that he was "not prepared to say that the findings were made without *any evidence* to support them" and therefore joined in the entry of the decree "in the hope that renewed application to the Secretary may bring relief" (R. 166). As pointed out in appellants' brief, the court labored under a misapprehension of law as to its authority in connection with the review of the order of the Secretary.

The second proposition advanced by appellees is equally without support in the Record. It is true that a larger amount of live stock was handled by the market agencies operating at the Omaha stockyards than was the case at Kansas City. A number of these agencies (the Group A agencies referred to in the order of the Secretary in the

Omaha case) exceeded in the number of head sold per salesman the hypothetical figure adopted in that case by the Secretary as a reasonable salesman's performance. This, as pointed out in appellants' brief, was not true in the case of any agency at Kansas City.

The unsupported statement is made that the diversity in number of head per salesman in favor of Omaha as against Kansas City is an "indication that the Kansas City stockyards in 1931 was obviously overmanned in comparison with the Omaha stockyards in 1925". There was, however, no evidence in the Record as to performance at Omaha. This statement, moreover, is made in direct conflict with all of the evidence in the Record. Undisputed testimony disclosed that it was much more difficult for salesmen to dispose of live stock on account of greater diversity of grades, qualities and weights at Kansas City than at Omaha, and that handling of cattle in the yards was much more difficult at Kansas City than at Omaha due to the long and narrow construction of the yards at Kansas City as compared with the relatively square construction at Omaha (R. 320-324, 329, 331, 571). This, in conjunction with the much smaller number of head of live stock handled per consignment in 1931 as compared with the year 1925 as set forth in the evidence and in the findings of the Secretary accounts for the differential (FF. 28, R. 40). All of the evidence in the Record at Kansas City showed beyond question that during the peak periods the entire personnel was required for the proper handling of the live stock upon the market, and was engaged in the performance of their duties during these peak periods for hours per day that would be considered very excessive in any other industry (R. 316, 447, 459, 460, 479, 491, 513, 609).

IV.

THE CONTENTION THAT THE RATES PRESCRIBED BY THE SECRETARY WERE DETERMINED BY A LAWFUL METHOD AND UNDER THE SAME PROCEDURE AS WAS FOLLOWED IN THE *TAGG* CASE, CANNOT BE SUSTAINED.

Appellees' brief itself points out the first line of distinction between the method followed by the Secretary in the determination of rates in the case at bar and that followed in the *Tagg* case. This difference was noted by the court below. This appears when the statement is made by appellees (Br. p. 58) that the Secretary classified costs into two groups (1) costs which the conditions of the business tend to keep down, and (2) costs which the conditions of the business tend to increase. The record and order in the *Tagg* case will be searched in vain for any cost classification of that character. In the instant case, while the classification is made, as suggested by the brief, in the form of a finding or conclusion of ultimate fact in the order of the Secretary, it is, as pointed out in appellants' main brief, unsupported by any evidentiary findings. No statement is made as to the nature of the "conditions of the business" to which this conclusion has reference, nor does the order in any way specify why such unnamed conditions in one instance tend to keep down costs and, in another instance, tend to increase costs. Common knowledge applied to the various categories of costs does not suggest a distinction. Apparently differentiation arose out of a desire on the part of the Secretary to place certain costs constituting a large element of the total expense in a category which would sug-

gest a treatment entirely hypothetical and under which the largest proportion of such costs, as actually incurred, would be eliminated from consideration.

Upon page 61 of appellees' brief appears a table which purports to show in one column the "weighted average actual unit cost" for each of the functions which the order claims "the conditions of the business" tend to keep down. Apparently in this column, as to all three species, the appellees have in four instances (yarding expense, office expense, administrative and general expense, risk expense and interest expense), taken the weighted average actual cost developed from the books and records of appellants and shown in the statistical cost study of the Secretary's chief accountant (Gov. Ex. 115). As to yarding and office salary cost, however, this column fails to reflect the accountant's "weighted average actual unit cost," but sets forth recalculated cost figures more than 33⅓% lower than the actual costs found by the Government's accountant. Thus, in respect of yarding cattle and calves, the average cost on this table is stated to be 7.04c., while it is said the Secretary allowed as reasonable 7.50c. As a matter of fact, weighted average actual unit cost, found by the Government accountant in respect to yarding cattle and calves, appears at page 7 of Government Exhibit 115, column 8, and is 9.63c. per head.[1] In column 12 at the same page of the same Government exhibit appears the weighted average actual unit cost in respect to office salaries. This, as stated by the Government accountant, is 8.23c. per head, instead of 4.8c. per head, as set forth in the inaccurate and misleading table contained in appellees' brief

[1]See R. Vol. III, p. 24, col. 8.

(p. 61). Correction of these two inaccurate figures contained in the table results in a total "weighted average actual cost" for all these classifications of expense, of 4.96c. per head in excess of the so-called reasonable cost to the Secretary. Applying this differential to the total number of head (2,489,772) handled during the year, the result is that, instead of being in excess of the weighted average actual cost in respect of these items of expense, as set forth in this table prepared by appellees, *the reasonable cost of the Secretary is less than the weighted average actual cost by the sum of $123,492.69.*

At this point appellees insert a long quotation from the opinion of the district court in *Tagg Bros. & Moorhead* v. *United States*, 29 F. (2d) 750, having to do with the method the Secretary followed in determining the cost allowances in that case, and follow this with the statement that the only difference in cost treatment between the two orders was that in the *Tagg* case the per car basis was used, while in the *Kansas City* case the per head basis was employed. What the appellees fail to do is to include in the quotation the following pertinent statements applicable to the order there, but inapplicable to the order in the cases before this Court, as follows (l. c. 545, 545):

> "Under these conditions, the Secretary declined to adopt averages of actual cost to the different agencies, and set before himself the task of finding the normal and reasonable cost per car of rendering the service for each species, cattle, hogs, and sheep. Then, itemizing the out-of-pocket cost apportioned on a per car basis for each species, he said that in each instance the figure adopted was 'a normal of the actual cost of the particular item to those firms

whose financial condition exhibits ordinary efficient management in their business'. This resulted in his finding that the reasonable cost of handling a car in the year 1925 on the Omaha market of the different species was as follows: Cattle, $13.25; hogs, $9.85; sheep, $13.05.

* * * * * * * *

"The Secretary found a maximum for the other items of costs of carrying on the market agencies in substantially the same way that he arrived at the salesman cost. He refused to be bound by either the lowest cost he found, or by the highest, or by any mathematical average. He found the cost which he deemed normal and reasonable, well below the highest and well above the lowest. As to each item there is proof that some agencies are getting the thing done in actual operation well within the maximum fixed. In each instance there are some agencies that are not keeping within the maximum. Necessarily so. Undoubtedly, if rates were fixed so high that certain profits were assured to all regardless, the agencies would multiply much faster than live stock could be brought to the market, and an endless chain of rate increases would be necessary. It is not the purpose of the regulation to bring this about. The exchange is an unincorporated association composed of the agencies, and we see no reason why reasonable limitations may not be put upon the number of its members."

V.

APPELLEES IN ASSERTING THAT THE PRESCRIBED RATES COVER COSTS AND PROFITS AS FOUND BY THE ORDER, NEGLECT TO CONSIDER THE ERRONEOUS CONFUSION OF "COST" WITH "PROFIT" AS POINTED OUT BY THE DISTRICT COURT AND THE DISALLOWANCE OF INSURANCE AND EXCHANGE EXPENSE.

In this section of Appellees' Brief it is claimed that the rates would yield a "liberal margin" amounting to $112,033.79 over the reasonable cost and profits found by the Secretary (Brief 67). If for the purpose of argument only we adopt the Secretary's theory of "hypothetical cost" and drastically reduce costs for those types of expense which he claims the conditions of business tend to increase, it yet remains true that the rates as prescribed fail to cover the so-called reasonable costs and profits if amounts erroneously excluded under the application of his own theory are added to these costs. This appears from the following calculations:

Total of reasonable cost allowed (1931 business) (Petitioner's Ex. No. 7)	$1,322,253.68
Insurance or risk expense erroneously eliminated (Govt. Ex. 115, p. 27. Compare Petitioner's Exhibit 7)	19,918.63
Livestock exchange expense eliminated (Govt. Ex. 115, p. 24)	21,713.64
Management and uninsurable risk expense (held erroneously eliminated. Opinion Lower Court, Otis J., R. 150)	101,432.82
Total "reasonable cost"	$1,465.318.77

Yield of prescribed rates if existing buying rates are maintained (Petitioner's Ex. No. 1)	1,423,774.70
Deficit representing failure to meet reasonable cost plus items above indicated.....	41,543.98

The Court in its first opinion (R. 150) stated that the Secretary had erroneously confused the cost of management and carrying uninsurable risk with profit, but that the failure to separate these items and include both was compensated for by the cushion or spread in the yield of the rates above the total of reasonable costs allowed. The statement of the Court was

> "In truth the rates fixed had an additional spread above all costs, including the two specified (management and uninsurable risks) which spread allows and provides for the alleged omission".

It must be conceded that insurance and exchange expense is incurred as incident to joint operations. Such expense would not be affected by the hypothetical elimination of all cost incident to competition and should be included in the costs allowed under the order's own rate making theory (FF. 99, R. 78). Although fully supported from a factual standpoint, covered by the assignments of error and conclusive of the invalidity of the order, this point was not emphasized or stressed by appellants' brief because of the broader and more fundamental questions presented by the record. These questions involve, as appellants view them, assumptions of the legality of administrative action and authority departing from all past economic, political or judicial precedent and rest on bases inconsistent not only with the Act granting jurisdiction but with the fundamental

requirements of our American system of a competitive economy. Appellants, therefore, do not permit themselves, even temporarily or for the purpose of argument, to admit the validity of the theories advanced and presented by the record in this case for the attention of the Court.

VI.

THE SECRETARY'S FINDINGS AS TO COSTS ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE, MUCH LESS THE WEIGHT OF THE EVIDENCE.

(A) Salesmanship.

In this section of their brief appellees object to the fact that appellants have pointed out that the costs, denominated as "reasonable" by the order of the Secretary, are hypothetical in the sense that they do not reflect the actual experience, as shown by the evidence, of any market agency or group of market agencies in business in Kansas City. This statement is made in appellees' brief:

> "As will be explained later in this brief, the Secretary had before him evidence as to abnormal conditions in the Kansas City stockyards which compelled him to reject the average cost of salesmanship to all market agencies, or the salesmanship costs of some 'typical or representative' market agency as a test of reasonableness.
>
> "To the extent that appellants use such epithets as 'hypothetical' for the purpose of suggesting that no salesman in the Kansas City market has attained or can attain the performance figures selected by the Secretary, or that the salary figures which he used were unreasonably low, appellants either ignore or distort the facts" (Br. p. 77).

1. Appellees do not contend that any cattle salesman reached the Secretary's salesmanship standard.

It will be noted that the brief of appellees contains no statement that any salesman operating in a reasonably efficient manner ever did sell at Kansas City the volume of cattle which the Secretary prescribes as the goal of salesmanship achievement. The statement is made that "under circumstances permitting reasonable efficiency" a salesman can sell the volume of livestock which the Secretary has associated with his salary figures (Br. 77). Appellees should observe that the opinion of the statutory court (R. 164) applies the term "hypothetical" to the so-called reasonable costs found by the Secretary and points out in the light of the admissions contained in defendants' answer and the facts in evidence that the order does not undertake, as in the *Tagg* case, to ascertain "typical" or "normal" costs, but seeks to speculate as to what might be the cost sustained under an assumed condition existent when the competition demanded by the Packers and Stockyards Act has been eliminated. That this is the effect of the opinion of the lower court, in entering a decree which can only be sustained upon the theory adopted by the Court, namely, that the Secretary was possessed of "almost dictatorial power", is beyond cavil.

2. Appellees without supporting evidence claim abnormal conditions related to entire Kansas City market.

Appellees try desperately to escape from the findings of fact so made by the Court and from the admissions contained in their own answer and yet, as above pointed out,

seek to justify the conclusions reached by the order on the statement that "abnormal conditions in the Kansas City stockyards" compelled the rejection of actual costs and prevented the ascertainment of costs on the basis of the actually sustained cost of a typical or representative agency or group of agencies. We have pointed out in our brief that in group rate making under the Interstate Commerce Act the Interstate Commerce Commission at the time of the passage of the Packers and Stockyards Act had adopted a settled policy of utilizing the actual cost experience of typical and representative carriers in the determination of reasonable rates.

3. Government relies on highly speculative opinion evidence as against actual performance.

The brief next refers, as supporting the Secretary's order, to the testimony of three witnesses, given at the first hearing and applicable to the year 1929, that salesmen could reach the performance standards set forth in the order. Appellants' Brief (pp. 119-125, incl.) discusses this so-called opinion evidence and clearly points out the lack of probative value of such evidence even from an hypothetical standpoint. Reference is made to the testimony of the witness, W. T. Angle, Manager of the Producers Commission Association, and a salesman, W. B. Ecton, employed by that association in 1929. Appellees attempt without success to reconcile the statement of the witness Angle, who said he had never sold "any livestock to speak of" himself, to the effect that a salesman could handle efficiently more than 1,000 single-deck cars of livestock in a year, with the fact that his association, which he testified was efficiently managed, reached only the average

in car load equivalents of 432 cars per salesman. Appellees, in justification of Angle's and Ecton's testimony when compared with the salesmanship performance of the agency which employed them of 432 cars in 1929, say:

> "Ecton's testimony can be taken as indicating that the firm (Producers Commission Association) did not receive a sufficient volume to enable any of its salesmen to exercise his fully ability" (Br. 84).

Examination of the record discloses that the total number of head of cattle sold by this association in 1931 was 70,071 (Gov. Ex. 115, p. 65[2]). An official publication of the Department of Agriculture entitled "Crops and Markets" (p. 12)[1] gives the receipts of cattle and calves at all public stockyards in the United States posted by the Secretary under the Packers and Stockyards Act in the year 1931. These public stockyards were 65 in number. Receipts of cattle at 46 out of the 65 public stockyards during that year were less in total number than the number of head handled by this one agency during 1931 in respect of which appellees contend there was not sufficient volume to permit Mr. Ecton, the witness, although he was the head salesman, to exercise his full ability in the efficient sale of livestock.

4. Testimony of witnesses as to salesmanship performance is misrepresented.

Appellees' brief refers to the testimony of Charles Vieregg (Br. p. 87), of the W. M. Leitch Sheep Commission Company. The short quotation from this witness's testimony, contained in the brief, indicates that Mr. Vieregg

[1]This publication is not included among the exhibits certified to this Court. Its nature renders it a proper subject of judicial cognizance.

believed that he and his partner, Mr. Stover, with the help of additional yard and office forces could probably sell more sheep than they were receiving. Their actual receipts, as shown by the record, were less than 60% of the hypotheical standard set up for the determination of costs in respect of selling sheep by the Secretary.

The quotations from testimony of this character, which are found in appellees' brief, indicate either a purpose to further confuse the Court as to the method of accounting employed or a desire on the part of the appellees "to have their cake and eat it too." The hypothetical performance standard adopted by the order requires not only the sale of 29,000 head of cattle or 250,000 head of sheep per salesman per year, but also the performance by the salesmen of a large part of the yarding, office and country appraisal work in connection with the efficient selling of this livestock. Clearly, such testimony as that of the witness Vieregg, quoted in the brief, does not support appellees' contention. It is an explanation that does not explain but, when properly understood, points directly to the fundamental defects of the method followed by the order in the determination of reasonable costs.

The same situation is true with reference to the quotation next appearing in appellees' brief from the testimony of James C. Swift, of the Swift & Henry Livestock Commission Company, a market agency which appellees state sold 138,133 head of cattle and calves and employs 6 cattle and calves salesmen. It will be noted, in the first place, that the volume of business of this agency was probably in excess of the total annual volume of receipts in 1931 at more than 50 of the 65 public stockyards throughout the United States under the supervision of the Secretary, and yet this agency

apparently did not have, in the judgment of the Secretary, a sufficient volume to give these 6 cattle and calves salesmen a full opportunity to display their ability and reach the hypothetical standards set up by the order. The quoted testimony of Mr. Swift is that, without additional expense for salesmen, if receipts could be increased on other than peak days or at times when market volume was low, no added expense for salesmen would be necessary.

5. Appellees refuse to recognize effect of peak receipts on operation of business.

This statement, which was repeated over and over again in the testimony of many witnesses, is apparently an insoluble riddle to appellees, but is perfectly understandable to every operator in the business. As pointed out in appellants' brief (p. 29), by reason of climatic conditions and other facts which neither the Secretary nor any one else can control or regiment, the Kansas City livestock market is subject to very great and somewhat abnormal seasonal variations. These variations are much greater than those at other markets. The average per day receipts represented only 17.9% of the highest day receipts in the year 1931 (Gov. Ex. 116). A finding of fact contained in the order states that it is impracticable to employ men sufficiently skilled to sell livestock on a daily, weekly or monthly basis (FF. 79, R. 61-62). It is, therefore, apparent that the load factor, which constitutes the principal element in augmenting unit costs in all utility and public service operations, is very high in respect to the operation of market agencies at Kansas City.

At another point in the brief, again presumably referring to the testimony of the witness Vieregg, appellees say that this witness testified that "his firm could handle twice its present volume of business without increasing its selling force" (Br. 91). What the witness did say in answer to leading questions was:

> "If we had twice as much, the chances are that we would do our selling just the same, but we would necessarily have to hire more men in the yards. The chances are that we would have to hire more people in the office, because that would take us away from our office if we had just twice as much under those conditions.
>
> "As to how many carloads or head of sheep a salesman can handle efficiently in an ordinary year, I can answer that, 'how many lawsuits can a lawyer try in a year?' There are a thousand things that would enter into it. Some days we work all day on a load. Some days we would sell ten easier than we could sell one. There is no way of getting at that question at all as I can see" (R. 454).

Appellees again referred to the testimony of the witness Swift (Br. 92) and say that he testified that "with a normal flow of business his agency could handle one-third more volume with practically no added expense". Examination of the testimony of the witness Swift discloses that he was careful to point out the influence of peak receipts upon the operation of his business. This witness said:

> "It is not practicable on account of variations in receipts to regulate personnel so as to meet the peaks of business without keeping your organization intact when receipts are at a point below the peak. Our

clientele expects certain men to sell their fat cattle, and grass steers, and fat steers, certain men to sell their stockers, certain men to sell their calves and butcher stuff. We do not know whether they are going to come in the day we have 7 loads or 70 loads, but when they do come it is with the understanding that the man who has been selling their livestock for them will be there on the job. We have to maintain the equipment, the volume of receipts from one day to another. It is not like the volume of business of the packing house where they have a mob assembled outside the gate, crowd and pack, in order to get a day's work. Our men are skilled men, trained in their work, and familiar with the operations and needs and desires of our customers" (R. 1036).

6. The finding or conclusion that salaries and personnel had not been reduced is unsupported by any evidence.

Appellees here refer to paragraph 113 of the Secretary's order (R. 82) in which it is stated that "the general impression" was gained from the record that the market agencies were attempting to maintain their personnel and the salaries thereof in 1931 at levels obtained in the more prosperous year of 1929. The statement is made that the evidence supported the conclusion. The record references given in the brief do not support or confirm this statement. In each instance reference to the record citations made disclose that expense had been reduced both as to personnel and other categories of expense wherever possible. One record reference given is Record page 729. The first statement on this page of the witness is as follows:

> "In the case of my own firm every item of expense that we carry on our ledger, country trips, postage and stamps, advertising, and market information, all show a big decrease in 1931 and 1932 as compared with 1929".

Reductions in the number of salesmen are then mentioned. Apparently the desire of appellees was simply to give record references regardless of whether or not they served to confirm or refute the conclusion or impression suggested by the Secretary and incorporated in the brief.

7. Appellees' attempt to cite proof of inefficiency has been unsuccessful.

Appellees' brief next adopts the expedient of reducing receipts of livestock by the market agencies to "carload equivalents" and then expressing as to various agencies the variations in the volume of such receipts, making comparisons with the number of salesmen employed (Br. 97). This constitutes an adroit but misleading method of creating a false impression of excessive variations in performance. As pointed out in appellants' brief many natural factors produce these variations. In the first place, as stated in the order of the Secretary, livestock is no longer sold in carload lots, the average sale transaction amounting to 5.22 per head in respect of cattle and calves. And, as pointed out elsewhere in appellees' own brief an increasingly high proportion of the livestock received is delivered by truck. Hence appellees have apparently gone to the trouble of reducing to carload equivalents livestock consigned to the various firms in order to create a false impression in the mind of the reader of the brief.

Next, appellees attempt to discountenance by bald statement, unsupported either by evidence or by findings of evidentiary fact, the testimony of all the witnesses as to provident and economical management of their respective businesses in employment of personnel. Unsupported statement contrary to all evidence is apparently expected to induce the belief that there were findings of fact to the effect that all the market agencies at Kansas City were abnormal in that they employed salesmen unnecessarily and in complete disregard of their own financial well being. Realizing apparently that such statements do not constitute argument any more than they constitute recitals of fact, appellees then attempt by distortion of specific evidence to indicate that in one instance, namely, the operation of the business of John Clay & Company in 1931 the salesmen employed by that firm came within 2,432 head of reaching the hypothetical goal of achievement adopted by the Secretary (R. 102). Despite the fact that six separate individual salesmen were employed by this appellant during 1931 to sell cattle, appellees' brief states "taking the year as an entirety, 4⅞ salesmen were required to sell this number of cattle and calves (117,345)" (Br. 101)[1]. This statement is based on a complete shift in fundamental assumptions. One of these salesmen was James Reid, head salesman for John Clay & Company at Kansas City, who received a salary of $12,000 per year. The questionnaire (Government Exhibit 115-B) disclosed that he devoted approximately 40% of his time to the actual selling of livestock in the yards and the remainder of the time to related services including a certain amount of time devoted to yarding. It discloses that two extra salesmen were employed,

[1]See Appendix C to appellant's brief.

one for a period of seven months and the other for a period of four months and three regular salesmen. Under the Secretary's formula the entire compensation of such a man as James Reid reduced to a basis of $4,000 a year was supposedly to be included as salesmanship expense. In this instance, however, appellees do not follow that formula but would drop entirely from consideration the compensation paid to James Reid by John Clay & Company for all that portion of his time not expended in the actual sale of the livestock in the stockyards. When the character and experience of the personnel of the owners of this agency was referred to at the hearing before the Secretary, counsel for the Secretary conceded that John Clay and his associates, who devoted their own personal attention to the management of the affairs of this agency, were exceptionally able, experienced and competent operators of market agencies (R. 301). Clearly, the judgment of these practical operators of this agency considered it necessary to hire six salesmen to sell 117,345 head of cattle and calves. Under any basis of calculation, however absurd, it is apparent that the goal of achievement postulated by the order was not attained. Under any reasonable consideration of the facts it was not even approached.

Next appellees refer to the Moffett Livestock Commission Company. Reference is made to the fact that a witness connected with this firm testified that three salesmen on the Monday preceding the day of his testimony had 34 cars of cattle to sell and succeeded in disposing of all except ten head. From this appellees draw the conclusion that the three salesmen sold more than twice as many cattle "as would be considered a reasonable day's performance under the Secretary's finding" (R. 102). Here, again, is exposed

the refusal of appellees to consider the actual reality of the situation which confronts the operators of these businesses. The average day's performance under the Secretary's finding of 29,000 head per year as to cattle and calves amounts to 145 head per day. As shown by appellants' brief and the evidence in the record (Appellants' Br. p. 30) the average per day receipts amount to only 17.9% of the highest or peak day's receipts (Gov. Ex. 116). This necessitates in respect of these salesmen a selling performance on peak days of more than five times 145 head, or over 700 head of cattle and the consummation of more than 145 sales per day per salesman.[1] This, of course, is a number of head greatly in excess of the performance "on the preceding Monday" of the salesmen of the Moffett Livestock Commission Company to which appellees refer (Br. 102).

The next reference is to the operation of the Bowles Livestock Commission Company (Br. 102). It is said that two salesmen disposed of 45,973 head of cattle, but that one of these salesmen spent approximately 20% of his time on other duties. Manifestly, any salesman could do this with the variation of receipts to which the market is continuously exposed and do it without affecting in the slightest degree the time devoted to actual salesmanship. Furthermore, under the Secretary's formula this 20% of time not devoted to salesmanship, but expended upon related duties, was considered a necessary part of the hypothetical salesman's performance and accounting was presumably had on that basis (FF. 115, R. 84). On this proposition appellees desire "to blow hot and cold," contending at one moment

[1]This would also assume the absolute even distribution of livestock among all the salesmen at the market in peak days—a situation unattainable without elimination of competition.

that all salesmen's compensation is to be considered under the heading of "salesmanship" irrespective of the distribution of their time to various duties, and on other occasions, where it serves their purpose to better advantage to distribute the time and compensation among other functions, to follow that method. Manifestly appellees cannot ride both horses at the same time.[2]

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[2]Attached to Appellants' brief as "Appendix C" is an analysis of Government's Exhibit 115B containing the information given by that exhibit as to the number of salesmen connected with each market agency for the year 1931 shown to have been full-time salesmen and those who were extra salesmen employed for only a few months. Because appellants assert that extra salesmen were employed in the peak season, it is charged by appellees that "This is a grotesque and flagrant distortion of the record because Government Exhibit 115B does not show that extra salesmen were employed at peak seasons." The assumption that they were so employed was fully justified.

In the footnote (Br., p. 111, footnote 36) reference is made to certain work papers in an attempt to make the Court believe that if these work papers were in the record, it would show that the extra salesmen were not employed in the peak periods. Appellees say: "They do not feel justified despite appellants' distortion of the facts in referring to the facts contained in these work papers * * * because these exhibits were not certified as part of the record." This assertion of appellees is, in itself, a misstatement and misrepresentation of the record. At the page of the record (R. 825) to which appellees refer, there appears a reference to "Government Exhibits 114-1A to 107A." No statement appears in the record of any kind or character as to what these exhibits were. ~~Possibly they were work papers; if so, they were never offered or introduced in evidence at the hearings and did not constitute originally a part of the record before the Secretary and certainly constitute no part of it now. If the Secretary considered them he did so improperly and without regard for the essential requirements of a fair hearing.~~

Reference is then made in this footnote to the fact that one Gerald Haggart ceased working for the Haggart Livestock Commission Company and was employed by John Clay & Company in 1931, with the statement that "Mr. Haggart may have been with his own firm during the peak season in 1931." Mr. Haggart was a cattle salesman. (Govt. Ex. 115B). The peak season in respect to cattle is, as shown by the Government's statistical exhibits, as well as by all the evidence, in the fall of the year (Govt. Ex. 120, A, B and C).

The result, however, is unimportant. It is too plain for argument that the owners of these agencies, in the financial position in which all of the agencies were placed during the period referred to, as disclosed by the audits of the Government accountants introduced in evidence, were not unnecessarily employing special or extra salesmen unless conditions of their business actually demanded it from the standpoint of efficiency of salesmanship. The labored attempt of appellees to induce the Court to give credence to the unsupported statement that the fact that "a firm hires a salesman, does not show that a salesman is needed to sell livestock" (Br. 114), is so palpably contrary to the evidence and findings and to ordinary common sense as not to warrant further consideration.

Certainly, Mr. Haggart, one of four brothers, originally connected with Haggart-Wilson, did not work for John Clay & Company in the spring and Haggart-Wilson in the fall of the year. The natural and correct inference is that his employment by John Clay & Co. commenced after the connection with the firm of Haggart-Wilson ceased. Reference is then made by appellees to one Ira Kimmons, a salesman employed for six months by Crider Commission Company. Again, Government Exhibit 115B shows that Mr. Kimmons operated his own agency for six months within the year 1931 and went out of business. He then worked six months for Crider Commission Company. The stipulation as to the condition of the business of the agencies the following year appearing in the record shows that Mr. Kimmons was not in business in 1932. It therefore clearly appears that he, a cattle salesman, commenced work for Crider Commission Company during the summer and that he worked during the peak season for this agency. A reference is also made to one C. M. Davis, a cattle salesman, who was connected with the agency of Jefferson-Lowry & Davis in 1931. This agency went out of business about the middle of the year 1931 (Govt. Ex. 115B, Stipulation, R. 196). He was then hired by the firm of Wright and Baucus (Govt. Ex. 115B). He worked during the peak season and, yet, appellees say "Here again it may be argued that Mr. Davis was employed not because help was needed in the peak season but to obtain the volume of business which he controlled." Assertions of this character clearly support, not appellees' unwarranted speculations, but the contentions of appellants.

8. Appellees improperly disregard the true criteria of efficiency of salesmanship.

Appellees challenge the statement that "price, not volume or speed, is the test of the salesman's ability and value" (Br. 116). It is said that this statement assumes that a high volume performance by a salesman is necessarily accompanied by a low per head price realization, while the Record indicates otherwise. The only testimony quoted by appellees on this point is that of the witness Bradshaw (Br. 118). This witness, however, definitely said that "There is a point at which the efficiency of a salesman is very materially reduced—when he has so many loads of cattle that he cannot give any of them proper attention, proper care and proper sales ability" (R. 543). The witness was a salesman for the Witherspoon Livestock Commission Company. Five cattle salesmen were employed by this agency (Government's Ex. 115-B; see appellants' brief). Upon the hypothetical performance standard adopted by the Secretary, this agency having handled 73,218 head of cattle and calves in 1931 (appellants' brief; Appendix B), should have employed not to exceed three salesmen. In fact, the standard would only allow for the employment of two regular salesmen and one extra or part-time salesman. Frank Witherspoon, one of the owners of this agency, testified that all possible effort was used "to econonize in every feature of the operations and with respect to all classes of expenses in 1931" (R. 918). He also described the effect of the peak load on their particular business. He testified:

"During the week of October 5, 1931, the Witherspoon Livestock Commission Company received on Monday of that week by rail 2,312 cattle and calves; Tuesday, 1,005 cattle and calves; Wednesday, 425 cattle and calves; Thursday, 88 cattle and calves; and no rail shipments on Friday. * * * I have referred to the week of October 5, but during the week of October 12, the same year, the situation was more difficult on account of the fact that the firm received on Monday of that week 2,856 cattle and calves; the next day there was a very abrupt drop in business to 957 head of cattle and calves; on Wednesday, 250 cattle and calves; on Thursday, 166 cattle and calves; and Friday, 68 cattle and calves" (R. 927).

He said: "This peak load we have in the fall of the year makes it imperative for us to keep an organization together to handle it. I mean what we would call a skeleton organization, the salesmen and the talented part of our force" (R. 922).[1]

This section of the brief develops a very interesting contrast in the treatment of the evidence when compared with succeeding sections. The statement is made that John Clay and Company and Swift and Henry Commission Com-

[1]Upon the Secretary's theory, each salesman in that firm would have been required to sell on peak days, if they completed the work, approximately 1,300 head of cattle and calves. If sales were made at the average in number of head of the market as a whole, each of the super-salesmen during the day's comparatively brief period of active selling would have been required to consummate and carry through more than 200 separate sales transactions. The absurdity from a purely mechanical standpoint of such expedition in selling is manifest. The requirement that it be done comes directly within the condemnation of the testimony quoted by appellees and could serve only the interest of the packers who buy the live stock, inasmuch as it would compel these salesmen, as one witness for the Government pointed out, to simply "get rid of the cattle" and accept the first bid received (R. 327).

pany were the agencies having the highest average per salesman performance as to cattle and calves, and were also among the highest in per head realization per cattle of the same weight class (R. 116). In discussing later in the Brief the subject of business getting and maintaining expenses (Br. 129), which include all expenses incident to securing proper information as to the quality and character of live stock sold, these particular firms are inferentially condemned as being among the highest in percentage of amounts expended. The result of this contrast is simply to support the contention of appellant that the expenditures for business getting and maintaining eliminated by the Secretary were essential to adequate and efficient selling service, and to expose the inconsistency of appellees' statements in different sections of the Brief.

(B) BUSINESS GETTING AND MAINTAINING.

Appellees at this point in their brief again attempt to refute the statement of the District Court that the method employed in the *Tagg Brothers* case was not followed by the order in this case. The argument is tantamount to an assertion that both the District Court and this Court were misled by the record in the *Tagg Brothers* case into the false and mistaken conclusion that in each instance the Secretary's cost findings were supported by evidence which showed that certain agencies were able to perform the service at lower cost than the Secretary found reasonable.

The claim is made that there has been no attempt by appellants to demonstrate that the business of any individual firm requires the expenditure of an amount in excess of the amount allowed by the Secretary to cover all the costs

classified as business-getting and maintaining expense (Br. 124). The most cogent proof of the necessity of these expenditures is that the expenditures were made and that when the total of aggregate actual salary and non-salary business-getting and maintaining expense for all firms as set up in Government Exhibit 115 is considered, we ascertain that the aggregate actual non-salary business-getting and maintaining expense for all agencies was $136,538.09 greater than the amount the Secretary's allowance would have produced and that the total salary expense found by the Government accountant as business-getting and maintaining salary expense (Gov. Ex. 115, p. 20, col. 9) amounting to $188,392.44 has been eliminated. It will be noted that the brief devotes but one sentence to the elimination of this item of $188,392.44 of business-getting and maintaining salary expense (Br. 128).

The claim, upon the basis of eliminating all salary expense, is made that a few agencies spent less for other business-getting and maintaining expenses than the product of the Secretary's reasonable allowance. While appellees do not identify the particular agencies there may be a few agencies as to which the original audits fail to disclose unbooked costs or in respect of which the cost distributions between functions were inaccurately made where this is the case. Appellees do not claim, however, that any of these agencies were normal or typical agencies.

The argument of appellees in this section of the brief is to the effect that while the appraisal of livestock prior to shipment and the advice and counsel of producers and salesmen is valuable to the producer of livestock and a part of the efficient selling service, inasmuch as all shippers do not request such services it is improper to include the actual

cost incident thereto (Br. 127). On the basis of this argument if a railroad company on the request of a passenger renders the special service of delivering his ticket and Pullman reservation at his office instead of requiring him to secure it at the station, the expense of the railroad in the rendering of this special service should not be included in the general operating expense for rate-making purposes. Likewise, if railroads, as the result of competition, are required to make door to door delivery in order to serve the convenience of shippers such expense would not be includable as an operating expense for rate making purposes unless all shippers paying the rates requested or required the service. Innumerable illustrations can be given of special services designed to promote the convenience of the public rendered by public agencies. The managements of the various public agencies deem it necessary to make these expenditures incident to the rendition of their service. Appellees question the propriety of the judgment of the management. And the argument advanced is not that the expense is "excessive" or "unnecessary" but non-includable as actually incurred because, as appellees say:

> "Every item of expense thus incurred by the commission men is incurred for the purpose of inducing a particular shipper to give his business to a particular firm" (Br. p. 132).

It is for that purpose that practically all service of this character is rendered. If such a charge condemns the expense incurred and justifies hypothetical treatment, then all expenditures made by a public agency are exposed to the same hypothetical treatment in rate making procedure. Appellees say:

> "Such services may aid producers in marketing their livestock but it would also aid the producer if the commission firm would furnish free of charge the feed necessary to feed the livestock" (Br. 132).

Is it to be presumed from this statement that in the event that as a portion of the stockyard service rendered by these market agencies the livestock handled was fed by the agencies to the extent necessary to properly maintain its condition, no expense therefore could properly be included for rate making purposes? The absurdity of such a contention is apparent without argument.

Appellees point out (pp. 129, 130) variances (explained in appellants' main brief) between the percentage of revenues spent for the costs classified as business getting and maintaining non-salary expense by different agencies. It is shown that the Producers Commission Association, a cooperative, of their total revenues, spent 24½% thereof for that purpose (Br. p. 130). It will be recalled that W. T. Angle, manager of this association, is the witness upon whose opinion testimony the appellees place such great reliance upon the question of salesmanship cost. They also produce a lengthy quotation from his testimony at page 130 of the brief, attempting to make it appear that the costs in the case of his agency were reasonable and within the limit of the reasonable cost covered into the rates by the order. Manifestly such was not the case because the Secretary only allowed 10% of reasonable cost—not 24½% of gross revenue for this purpose and a large part of the deficit of more than $20,000 incurred by this agency, as pointed out by appellants, under the Secretary's prescribed rates, would have been the result of the arbitrary elimina-

tion of more than 50% of the actual cost incurred under the classification of business-getting and maintaining.

The brief quotes from the testimony of the witness C. A. Stuart and says that on the basis of the analysis of the expenditures shown in the order for his firm he considered that 2.8% of his gross revenues from commissions would represent his out of pocket soliciting expenses for 1931 (R. 1055, Br. 130). This witness testified that the actual soliciting or business getting expense sustained by his firm would not exceed 2.8% of his gross revenues (R. 1056). This represented, however, a very small part of the total expenditures classified by the Government accountant as business getting and maintaining expense. Singularly enough, although they devote many pages to business-getting and maintaining, appellees utterly fail to mention the character of the expenses included and attempt to let the Court believe it is all advertising expense. Mr. Stuart pointed out, and his testimony was unchallenged (R. 1054) that of a total of more than $3,000 of expenditures of his firm so classified, less than 15% "related to advertising or soliciting". This testimony when understood exposes the lack of integrity of the procedure and method of accounting and cost finding adopted and followed by the order.

Similar expositions of the true facts could be given in connection with the testimony of other witnesses referred to by appellees and with respect to which only detached excerpts are included in the brief without any explanation of the context or the application of the testimony to the facts. Appellees quote from the testimony of the witness F. E. Mollin given at the first hearing (Br. 141). It will be recalled that that hearing related to conditions obtaining

in 1929 and that elsewhere in the brief appellees make the claim that it was a period of "great prosperity". Yet the quotation from this witness commences with the statement "The livestock industry today is in the dumps and cattle are losing money" (R. 248). Several other live stock producers testified and each of these witnesses stated that the services classified as business-getting and maintaining expense by the Secretary were of the utmost value and importance to them (R. 279, 472).

Certainly appellants are not to be prejudiced by testimony which they have had no opportunity to refute and in respect of which no findings of fact have been made in this case (Br. 149). And yet appellees refer repeatedly to the Record in the so-called *Denver* and *Chicago* cases.

Appellees include in their brief (Br. p. 145) a lengthy table in which it is asserted a comparison is made by firms for actual expenditures for business getting and maintaining and the total allowance for such expense under the Secretary's order. It will be observed that 18 of the 61 firms included in this purported comparison are not presently engaged in business. The table purports to show that for 10 agencies out of the 61 the actual expense for business-getting and maintaining was less than the total allowance under the Secretary's order.

Of these ten agencies, four have discontinued business.[1] One has since been reorganized,[2] and each of the remaining agencies handled a relatively small amount of business, was operated by either one man or by a closely-held partnership, or under such conditions as to suggest the failure to book

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[1]No. 11, L. B. Andrews Livestock Commission Company; No. 37, Link Fasken Commission Company; No. 66, W. P. Peed Livestock Commission Company; No. 72, Welch Livestock Commission Company.

[2]No. 66, Robinson-Hoover Commission Company.

or record costs of this character actually incurred.[3] None of the agencies so included was one either of the eleven or twenty-one agencies referred to as efficient firms of large volume by the Secretary's order (FF. 86-88; R. 68-73).

(C) THE SECRETARY'S ALLOWANCES FOR YARDING AND OFFICE SALARY COST ARE NOT SUPPORTED BY THE EVIDENCE.

Appellees insert a table in their brief (Br. 151) which purports to compare the Secretary's finding as the unit cost of yarding salaries with the "weighted average unit cost actually incurred" by appellants. It is stated in this table that the unit cost as to cattle and calves amounted to $0.075 per head and the weighted average of unit cost actually incurred as shown by Government Exhibit 115 and 115-B amounted to $0.0704 per head. If we refer to Government Exhibit 115, page 7, column 8, we find the yarding salary unit cost set out and it appears that instead of the weighted average unit cost actually incurred amounting to $0.070 per head the figure is $0.0963 per head. Similar discrepancies exist to mislead the court in respect to the comparisons made concerning sheep and hog costs. The brief infers that objection may be made to the Secretary's findings as to yarding salaries on the ground that the findings were too low. The objection is that the findings were not in accord with the Government's own testimony and that it does not promote proper understanding of the case to conceal, because the record is voluminous, the actual fact about the matter.

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[3]No. 9, John M. Nichols; No. 15, Elliott-Swain Livestock Commission Company; No. 61, Ham Knighton Commission Company; No. 65, Moffett Commission Company; No. 76, Greer & Company.

Another table is inserted attempting to make the same comparison with respect to office salaries. In this table it is claimed that as to cattle and calves the reasonable unit costs were $.0525 per head while the "weighted average unit cost" as shown by Exhibit 115 and 115-B was $.0480 per head. In the same exhibit (Gov. Ex. 115, p. 7, col. 11) appears what the Government's accountants claim to be the weighted average unit cost as developed in Exhibits 115, 115-B. Instead of $.0480, as stated in appellees' brief, the figure is $.0823 per head or almost twice as much. Similar inaccuracies favorable to appellees and distorting the evidence or preventing proper understanding as to sheep and hogs appear in this table (Br. 152, Gov. Ex. 115, 115-B). Appellants in their brief pointed out variances between the cost table set up as evidentiary findings in the Secretary's order and the cost tables appearing in Government Exhibit 115. Appellees answer with the statement that the asserted variance does not in any way affect the validity of the Secretary's findings; and assert that appellants, in the face of this evidence, do not contend that the Secretary's findings as to reasonable unit cost of yarding salaries and office salaries are unreasonably low. It is true that it makes little difference to appellants whether the costs eliminated relate to yarding salaries or office salaries or salesmen's salaries, if the effect is to produce an aggregate "reasonable cost" far below the actual cost of any agency.

Appellees made the claim in their answer when the integrity of the functional unit costs was challenged by the petition that the functional unit costs were accurately distributed in accordance with the time devoted by the various workers to the various functions of the business. They stated that such segregation of costs was "not

arbitrary and that it does not vary from the facts of the business of petitioner market agencies" (R. 142). Clearly the variances are so material between what is asserted on the one hand by appellees' brief to be the unit cost actually incurred and the same unit cost as set up in the Government's accountants' cost study as to establish conclusively the fact that both cannot be at the same time correct and accurate representations of the functional costs incurred.

Appellees apparently entirely miss the point made by appellants' brief in this connection. Comparisons of individual functional costs relating to different agencies can only be of probative value if they represent similar items of expense and if in each instance sound bases of cost distribution and allocation have been employed. Defendant's answer states that this was true and says that

> "Such functional division for the purpose of determining costs is not affected by the fact that the same men commonly perform several different functions."

The Government's accountants, upon the bases of the questionnaire and information available to them (Government Exhibit 115-B) made distributions of salary expense in accordance with the relative amount of time devoted by the different men engaged to the several functional accounts established. Appellees admit in the brief that these functional classifications were abandoned by the Secretary and that this occasioned the tremendous variations between his evidentiary costs tables and those of his accountants (Exhibit 115, Appellants' brief, pp. 150-171).

Appendix C and the notes thereto appearing at page 191 of Appellees' brief, explain some of the methods employed by the Secretary in recalculating and redistribut-

ing costs. It is here admitted that in those instances where portions of yardmen's salaries had been allocated by the Government's accountants to selling and buying, because time was devoted to these functions, the amount so allocated were restored to yarding; that where non-owner salesmen's or buyers' time had been allocated to yarding expense by the Government's accountants, these amounts were "restored to selling and buying". Naturally, this meant complete elimination of these latter amounts as costs, under the theory adopted by the Secretary in his salesmanship allowance. Having been eliminated from yarding expense, they were "restored to selling and buying" and were therefore considered to have been covered by the arbitrary salesmanship cost allowance made by the Secretary.

Thus, in the case of Firm No. 6 (Lewis & Flournoy Commission Company) we find that 25% of the time of George Rhodus, which he devoted to buying cattle and selling cattle, is added to the yarding schedule because he spent 60% of his time yarding, while the time and expense attached to the yarding service of R. H. Lewis, whose primary function was that of a cattle salesman, is eliminated (Gov. Ex. 115-B). The amounts were small in this instance but the addition of selling or buying expense to yarding and the elimination of yarding expense manifestly, inevitably, and conclusively produced a cost table, as set up in the Secretary's order, non-representative of the facts and not truly functionalized.

The degree of the non-representative character of the cost table varied as between agencies. One of the agencies referred to in the table appearing in Appendix C is Agency No. 66 (Jay D. McCormick Commission Company). Here was an individual operator and, as shown by

Government Exhibit 115-B, he performed a large part of his own work. No actual yardmen worked for him for the reason that he did his own yarding. He did, however, in the course of the year pay one man $2.75, another 95c., another $19.85 and another $11.10, as compensation for bringing live stock from the unloading chutes to his pens. The Secretary's accountants included in their costs (Government Exhibit 115-B, p. 66) $141.38 to compensate Mr. McCormick for his own time utilized in the yarding of the live stock he handled. Thus the projection of these figures into the Government accountant's costs produced the total of $164.93. Under the Secretary's process he eliminates, as shown by Appendix C, all of the sum of $141.38, leaving a balance of $23.55 or .0064c. per head as representative of yarding expense in connection with the operation of this man's business.

No further reference is needed to expose the ridiculous and absurd procedure thus adopted and the fallacious character of the result produced. The Government's accountants' costs in this case were low in the first place. The Secretary's method reduced them to an extent that made them utterly non-representative of the cost item which they purported to reflect. Figures of this character scattered promiscuously through the cost tables contained in the order and repeated again and again in appellees' brief are capricious and arbitrary, and can only confuse, rather than enlighten, the one called upon to read the record. The illustration given is typical of the general treatment given this subject by appellees' brief.

An attempt is made to promote a false impression that much of the business-getting and maintaining expense is incident to the solicitation of business. The statement is

made that "the whole market territory is covered by the solicitors from the commission firms" (Br. 140). On the contrary, the findings of fact say that the rules of the exchange to which the appellants belong prohibit the employment of traveling or paid solicitors by each and all of the appellant market agencies. All the soliciting that is done is in connection with the trips to the country made by salesmen for the purpose of appraising livestock and counseling customers when business is dull at the market during the latter days of each week.

Reference is also made on this page of the record to the maintenance by the Bureau of Agricultural Economics of a daily schedule of broadcasting at Kansas City in addition to the exchange broadcast. The record does not disclose it but the appellee, Secretary of Agriculture, gave public notice more than a year and a half ago to that effect that the daily ratio broadcasting service of the Bureau of Agricultural Economics at Kansas City had been discontinued. Therefore the duplication of services referred to in appellees' brief in an attempt to impugn the necessity for certain expenditures made by the Exchange in broadcasting market reports is without merit.

VI.

APPELLEES INCORRECTLY STATE THAT APPELLANTS DO NOT CHALLENGE THE RESULT OF THE FINDINGS OF THE SECRETARY AS TO INSURANCE OR RISK EXPENSE.

The treatment by the order and appellees' brief (Br. 161) of the item of insurance it typical of the whole process

employed. Manifectly the appellants cannot, except in a brief of inordinate length, call attention to the multitudinous errors contained in the many tables of figures and calculations inserted in appellees' brief. The general result can only be depicted by a method illustrative of what has actually occurred and of what the tables really are. We have hertofore pointed out that, despite the references made to Government Exhibits 115, 115-B, 114-1 to 107, the specific figures used in these tables cannot be related to the actual cost calculation of the Government's accountants as found in those exhibits. This is true as to insurance where the calculations are comparatively simple. Reference is made in the cost table appearing in the brief (p. 163) to the Secretary's total reasonable allowance for insurance as amounting to the sum of $21,067.66 and to the book expense and accruals of insurance shown by "Government Exhibit 115, page 27", as "$22,265.47". Reference to Government Exhibit 115, page 27, shows the following items of insurance expense:

Furniture and fixtures...	$ 911.76	(Col. 1)
Market bonds	6,335.02	(Col. 4)
Employees' compensation insurance	7,843.10	(Col. 5)
Mortgage and theft insurance	9,893.50	(Col. 9)
Forgery and miscellaneous insurance	2,142.42	(Col. 10)
Public liability insurance .	9,916.90	(Col. 11)
Total insurance cost as per Govt. Ex. 115	$37,041.70	

57 by accountant.

It will be observed that the figure given by reference to this exhibit in appellees' brief (p. 163) ($22,265.47) is $14,776.23 less than as stated ~~in~~ appellees' ~~brief~~. This distortion and other distortions involving departures from costs found by the accountants destroy the applicability of this table. Part of the difference in the insurance expense might be explained by the statement appearing on page 161: "The Secretary did not include in his computations an allowance for public liability insurance and the record supports his action." Three of the citations to the Record simply have to do with testimony involving the cost of the public liability insurance. The last reference (R. 285) is to the statement of an insurance man who claimed that he had not written any public liability insurance for market agencies and, when questioned about it by Government counsel, presumed that it would relate only to damages suffered by the public as a result of animals escaping from the yards. No reason is given in the Secretary's order for the elimination of $9,916.90 of this expense for public liability insurance set out by his accountant in this exhibit (Gov. Ex. 115). But, even with that elimination from the Government's accountants' cost, there yet remains a discrepancy of approximately $5,000 between the figures set up in the appellees' table and the evidentiary support for this item as set forth by appellees (Br. 163).

VII.

THE APPELLEES' CONTENTION THAT THE ORDER CONTAINED LEGALLY SUFFICIENT FINDINGS AS TO THE UNREASONABLENESS OF EXISTING RATES IS WITHOUT MERIT.

As pointed out in appellants' brief, the order of the Secretary contains only an ultimate finding as to the unreasonableness of existing rates unsupported by any evidentiary statement determining the yield of those rates to agencies, either as individuals or by groups. In fact, the answer of the appellants as well as the evidence of the Government accountants indicates that these accountants were unable to determine accurately the revenues to be derived from a rate structure such as the existing rate structure predicated on a headage consignment basis which the order declared unreasonable.

Reference is made to ultimate findings contained in the order and set forth in the form of conclusions in the attempt to make it appear that these findings constitute evidentiary findings establishing an "abnormal competitive condition in the Kansas City market". As pointed out by appellants, the findings are utterly insufficient and the conclusions are not in accord with the evidentiary findings contained in the first 113 paragraphs of the Secretary's order.

VIII.

APPELLEES FAILED TO MEET THE ALLEGATIONS OF THE PETITION DISCLOSING PROCEDURAL IRREGULARITY AND THE DENIALS OF APPELLANTS OF THE FULL HEARING REQUIRED BY THE STATUTE.

Appellees in this section of the Brief admit the allegation in the petition that Rexford G. Tugwell was not in fact "Acting Secretary of Agriculture" at the time he heard the oral arguments in the proceeding before the Secretary out of which the order arose (Br. p. 175). But it is claimed by appellees that this makes no difference because Rexford G. Tugwell was at the time Assistant Secretary of Agriculture and "authorized to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned by the Secretary of Agriculture" (Br. 176). The Packers and Stockyards Act did not provide for the determination of the reasonableness or unreasonableness of market agency rates, charges and practices by the "Department of Agriculture". This legislative function was delegated to the "Secretary of Agriculture". An Acting Secretary could have performed the duty. Rexford G. Tugwell purported to be an Acting Secretary as set forth in the questioned order (par. 15, R. 333). Furthermore, no assignment made by the Secretary of Agriculture to Rexford G. Tugwell as Assistant Secretary of Agriculture of the duty of exercising the legislative authority granted to the Secretary of Agriculture in connection with this proceeding is referred to in the order or was made. If so, it would be presumed that the Assistant Secretary of Agriculture, having heard the argument, would have decided

the case and signed the order. In fact, it is out of this situation that the objection of the appellants to the procedure originates. All appellants asked was for a fair hearing before some one authorized and empowered to decide the issues. At the conclusions of the hearings before the Examiner who took the testimony (R. 1095), counsel for appellants stated that "he would continue to demand that the Secretary hear personally the argument on the evidence in behalf of the individual respondents or at least have some definite course of procedure adopted whereby the Examiner or some one else should formulate a report on the evidence so that respondents could have the character of hearing and right to present their side of the issues in this case which they believe the law entitles them to." The petitions charge that the Secretary acted upon reports and information given to him by unknown persons in the Department. Appellants had no opportunity as requested to present their side of the issues to him or even to examine reports upon the evidence presented to him if such were in fact presented or considered. Certainly this procedure is not justified by any of the authorities referred to by appellees. It constitutes a denial of that due process of law which requires a fair hearing, and violates the provisions of the Act which demand that the Secretary grant to the parties in a proceeding of this character "a full hearing".

CONCLUSION.

The original issues involved in the order of inquiry and investigation made by the Secretary in this proceeding were comparatively simple. It would have been entirely possible,

inasmuch as the purpose of the inquiry was to determine whether the rates and charges of each of the appellants in the aggregate were unreasonable, to have considered the aggregate costs of the rendition of such public service as appellants rendered during the test year. As repeatedly pointed out by appellants' accountant, this aggregate cost could be found with a fair degree of accuracy. The issues would have been simplified if individual treatment had been given to each appellant as demanded severally on behalf of the market agencies involved. But the purpose from the very outset was apparently to introduce into the proceeding all of the confusion, uncertainty and difficulty that it was possible to produce by involved accounting practice and arbitrary functional cost distributions. The apparent purpose was to cloud the simplicity and clarity of the real issue both from the standpoint of accounting and practical considerations and thus to produce a situation that would render review either by the Secretary or the courts so difficult and involved as to prevent fair and adequate consideration.

Such also appears to have been the purpose or object of many statements in appellees' brief. After all, the result in the aggregate as applied individually, by groups or in the entirety to appellants is the deciding factor. This Court has many times overlooked the method involved in order to sustain orders of administrative tribunals that reached on the evidence an ultimate result that appeared to provide a fair return. Such admittedly is not the case presented by this record. On the contrary, the effort of the appellees is to submerge the ruinous and confiscatory character of the result of the prescribed rates in unnecessarily involved accounting procedures and argumentative statements.

It is respectfully submitted that the decree of the District Court should be reversed and orders entered as prayed in the respective petitions of the several appellants.

Respectfully submitted,

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